SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 243

UNITED MINE WORKERS OF AMERICA,
Petitioner,
vs.
PAUL GIBBS,

RESPONDENT'S REPLY BRIEF

To the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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To the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

The respondent does not differ with the statement of opinions below, the statements as to jurisdiction, the statements as to the statutes involved, and the general statement of the procedural history of the case and the decisions of the District Court and the Court of Appeals as set out in the petitioner's brief. Respondent does not

believe it necessary to be repetitious and copy these items in this brief, but does rely on them by reference as if fully copied in respondent's brief.

COUNTER STATEMENT OF THE EVIDENCE.

The respondent does not disagree with the statement of evidence as contained in petitioner's brief and in the reference made to the record of the case. The inferences as drawn by the petitioner from the facts in the record are not in agreement with the respondent's belief as to the inferences which might be drawn from the facts. Respondent believes that the case at bar was one involving concerted activities, and had an objective of instilling throughout the entire area a setting which was to intimidate and create widespread fear and tension in the coal fields. The respondent submits a counter statement of facts which should be used in conjunction with the facts as set out in the petitioner's brief.

Respondent, Paul Gibbs, for more than thirty-two (32) years prior to August 15, 1960, since he was fifteen years of age, had been engaged in the coal, or coal mining, or coal hauling business (89a).

On August 12, 1960, Paul Gibbs was employed by Grundy Mining Company as mine superintendent at the starting salary of Six Hundred ($600.00) Dollars per month and in the capacity of an independent operator was granted a coal hauling contract to haul the coal produced at Gray's Creek Mine at a price of seventy-eight (78¢) cents per ton (93a).

On Saturday, August 13, 1960, Waldon Schrum received information of the proposed opening of the Gray's Creek Mine by Paul Gibbs in Grundy Mining Company (457a). Waldon Schrum was the president of Local 5881, and he immediately tried to contact George Gilbert, District 19 representative, to tell him the information and advise

him of a called meeting of Local 5881 for Sunday, August 14, 1960 (465a, 457a).

On August 15, 1960, several members of Local 5881 went to the entrance of the Gray's Creek work site where they met the men employed by Grundy and persuaded them not to attempt to commence work. The persuasion being aided by a display of fire arms among the members of Local 5881 (99a-101a and 151a).

On August 16, 1960, a substantial number of men employed by Grundy reported to the mine site where they were met by a crowd, numbering from forty (40) to one hundred fifty (150) men, a large number of whom were carrying various types of fire arms, who again persuaded the men not to attempt to commence work. The persuasion, at this time, was brought home to the employees when one of their vehicles was fired upon and hit by one of the members of the mob. Paul Gibbs' truck was stopped as he drove along the Pocket Road when it reached the intersection of Gray's Creek by eight (8) to ten (10) men who ran along in front of the truck with guns raised to their shoulders and pointed at Mr. Gibbs. One of the members of the group opened the truck door, grasped Mr. Gibbs' arm and attempted to pull him from the truck while the remaining men maintained their weapons to their shoulders. Mr. Gibbs was detained for approximately two (2) hours during which time he was apprehensive as to who was going to hit or shoot him first. Later, he was escorted by a motorcade to the intersection of Coal Valley Road and Highway No. 108, a distance of approximately two (2) miles from the Gray's Creek entrance where he witnessed the beating of Johnny Cain and the burning of his brief case and other papers. Gibbs and Cain were escorted from this area through Palmer, Tennessee, up to the intersection of Highway No. 108 and Highway No. 185 before the mob agreed to release Mr. Gibbs (103a-110a and 151a-154a).

On August 17 or 18, 1960, a mob or a crowd of one hundred (100) to one hundred twenty-five (125) men gathered near the office of Tennessee Consolidated Coal Company, parent of Grundy Mining Company, at Palmer, Tennessee. Two (2) officers of the Company were harassed by the crowd, some of whom were carrying weapons. One of the Company officers was manhandled and cursed, and one of the crowd pointed a 30-30 carbine rifle at the officer as he was getting in his car. Attempts were made to block their car so they could not leave, and finally when they were about to leave, two (2) cars pulled in side by side in front of their car so they were not allowed to pass (232a, 247a-248a).

On August 22, 1960, a visitor to the area asked a group of men picketing near Highway No. 108 for George Gilbert, after recognizing Gilbert's car at the scene. George Gilbert came out of the woods and told the visitor he could not go down the Pocket Road, but suggested another route to the visitor's destination along which he would observe some of Gilbert's men, whom he was told to tell that it was alright to pass (159a-162a).

After these events, Paul Gibbs was forced to turn over the operation of his mine to one of his employees, and within a week or ten (10) days after the violence of August 15 and 16, a sack was burned at the mouth of the mine, which could suffocate workers in the mine if they stayed there long enough; and an exhaust fan belt which was cut several times (452a-454a).

Gray's Creek area is one of the best coal areas in the Sewanee coal scene, and it was contemplated that Grundy Mining Company would eventually open around ten (10) mines in the Gray's Creek area (201a, 215a). That after the violence and activities of August 15 and 16, and thereafter, Tennessee Consolidated Coal Company or Grundy Mining Company would not hire Paul Gibbs, because, had Paul Gibbs been hired, none of the mines

would have been open today (206a). Tennessee Consolidated Coal Company would not execute leases of prime coal bearing lands to Mr. Gibbs, because it would have been a waste of time as he would never have had the opportunity by himself to mine coal (214a-215a).

It was shown at the trial that George Gilbert told Paul Gibbs, "I want you to keep your damn hands off of that Gray's Creek area, and tell that Southern labor union that we don't intend for you to work that mine" (128a). George Gilbert also made statements to others in regard to Paul Gibbs that "Hell, we can't let that go on" and that "Paul was trying to bring in the other union" and that he (Gilbert) said, "He ain't going to get by with it" (219a). "Paul was trying to bring in the Southern labor union into the coal field" and he (Gilbert) said, "The union won't let him do it." "They have ways of preventing him from doing it," "and he seemed to think Gibbs was going to have to go," "and he said he had friends in high places that could move him out of the mine business" (257a-258a).

After this threshold success, picketing was maintained for a period of nine (9) months, seven (7) days a week, twenty-four (24) hours a day, at the entrance to the mine area (383a, 332a-333a).

SUMMARY OF ARGUMENT.

I.

This was an action for damages brought by the respondent for the violation of his lawful right to engage in a lawful business, free from the unlawful interference of the petitioner. The complainant, although alleging two grounds of recovery, one Federal ground and one State ground, alleges the violation of a single right and states only one cause of action. The District Court properly found that it had jurisdiction of the case for the alleged violation of a right protected by Federal Statute, which stated a cause of action established by the Federal Statute and under the doctrine of pendant jurisdiction, had jurisdiction of the Common Law action, under State law. The gist of an action brought under the Federal Statute and the Common Law tort are basically the same, and under both grounds, any invasion of respondent's rights by unlawful violent means is not protected by the Federal Statute.

II.

Liability for the unlawful activity of a union under both the provision of the Federal Law, 29 U. S. C. A. 187 (b), and under the Tennessee Common Law, for the unlawful interference with business relations is to be determined under the law of agency as it has been developed in Common Law. Mass picketing, violence and threats of violence of bodily harm are conduct which is an imminent threat to public disorder, and cannot be classified as traditional union activity which is protected by the Labor Management Relations Act, and thereby jurisdiction of a District Court or State Court is preempted by the Federal Statute. The conduct as shown in this case, definitely fell within the area where a State Court at the outset could have enjoined the violent con-

duct and even to have awarded damages under the State Law, for the consequences of such conduct as defined by the traditional law of torts. The District Court having jurisdiction, the damages which might be awarded under the State Law, both compensatory and punitive, were permissible. The totality of Effort Rule is not applicable in this case, as the use of peaceful picketing was not the cause of the injury to the respondent. Whether or not there had been peaceful picketing after the original violence is immaterial, as the original violent acts completed the tortious interference with the respondent's protected rights.

III.

The petitioner received a fair trial on all issues, both on the liability and damage aspect of the case. In a case where violence, such as the violence involved in this case, the facts in themselves are repugnant to common decency and fair play. The argument of respondent's counsel was not such that would prejudice or bias the jury toward the petitioner, and deprive him of a fair and honest trial. The Court did not find that argument of counsel was prejudicial in inciting passion or prejudice in the jury and the jury's determination of liability, but did feel that it should be taken into consideration on the excessiveness of the verdict. Any error which may have occurred, if any, for any improper remarks in argument by respondent's counsel, was cured by the District Court on petitioner's Motion for New Trial, in making a new trial conditional upon the respondent remitting a portion of the damage, which the District Court felt to be excessive, and thereby cured any error or counsel's argument.

IV.

When the answer to interrogatories are viewed in relation to the Court's instructions to the jury, and the record as a whole, the verdict of the jury is not inconsistent with

its answers to interrogatories. The jury was instructed that only actual damages could be recovered under the violation of the Federal Statute, but under the Common Law, that both actual and punitive damages might be recovered, and in the jury's answer to interrogatories, it found the Common Law and Federal Statute to be violated, but awarded damages only under the Common Law, the verdict and answers to interrogatories were consistent. The case was properly submitted to the jury, and no error was committed in submitting the case on both theories of recovery, in view of the District Court's instructions to the jury.

ARGUMENT.

QUESTION NUMBER ONE.

Did the Court Below Properly Invoke the Doctrine of Pendant Jurisdiction in Adjudicating the State Common Law Cause of Action.

The decision under review is one of a number of cases involving petitioner where the Sixth Circuit has approved the exercise of pendant jurisdiction.

This is a suit to recover damages from the petitioner for injury sustained by the respondent as a result of petitioner's alleged unlawful violation of the secondary boycott provision of the Labor Management Relations Act, Section 8 (b) (4) and 303 as amended, 61 Stat. 158, 73 Stat. 545, 29 U. S. C., Section 158 (b) (4) and 187, and the Common Law tort of unlawful interference with respondent's right to engage in a lawful employment and business under the laws of the State of Tennessee.

The complaint (R. 10 through 14, R. 32 and R. 30, 31) alleges two grounds of recovery, one Federal ground and one State ground, but only a single cause of action. The complaint alleges the violation of a single right, the right to engage in a lawful employment and business, free of unlawful interference by the petitioner and it is the violation of this right which constitutes the cause of action. In **Donnelly v. Jackson Brothers**, 2 Court of Civil Appeals 408 (1911), it was established in Tennessee law, that the malicious interference with the business or business relations of another, followed by a detriment, is an invasion of legal rights and is actionable tort under the Common Law as much as an actual trespassing upon the business premises. Respondent also cites **Dukes v. Local Union, No. 437**, 191 Tenn. 495, 235 S. W. 2d 7 (1959), and **Love and Amos Coal Company v. United Mine Workers**, ...

Tenn. App. ..., 378 S. W. 2d 430 (1963), Cert. denied 376 U. S. 971, 84 S. Ct. 1137 (1964).

It is also an established principle of law in Tennessee that it is unlawful to conspire to injure the lawful business of another. The Supreme Court of Tennessee in **McKee v. Hughes**, 133 Tenn. 459, defined a civil conspiracy as follows:

> "A civil conspiracy may be defined to be a combination between two or more persons to accomplish by concert of action an unlawful purpose or to accomplish a purpose not in itself unlawful by unlawful means; the damage caused by the jest in any action."

In support of the above statement, we also cite **Brumley v. Chattanooga Speedway**, 138 Tenn. 534 (....); **Hutton v. Waters**, 41 Tenn. C. C. A. 582 (....); **Duplex Printing Press Co. v. Deering**, 254 U. S. 443, 41 S. Ct. 172 (....).

Secondary boycott has conspiracy inherently in its nature. It is necessary for more than one person to engage in the proscribed conduct in order for the secondary boycott to come into existence and an interference with the right protected by the Federal Statutes. It is the respondent's contention that the facts to establish the violation are identical or substantially identical and actually are different only in name. The complaint clearly alleges two distinct grounds in support of a single cause of action and not two distinct causes of action.

The matter of a single cause of action with different grounds of relief is explained very thoroughly in the case of **Baltimore Steamship Company v. Phillips**, 274 U. S. 316, 47 S. Ct. 600 (1927), where it was ruled by this Court a suit in Federal Court involving a claim for personal injuries with a decision upon the merits was res adjudicata as to a second suit involving the same matter later brought in a State Court and based upon State law.

"The effect of a judgment or decree as res adjudicata depends upon whether the second action or suit is upon the same or different cause of action. . . . If upon the same cause of action the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties, or those in privity with them, not only in respect to every matter which was actually offered and received to sustain the demands, but also as to every ground of recovery which might have been presented."

* * * * * * * *

"The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist, and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piece-meal under successive actions to recover for the same wrong and injury."

* * * * * * * *

"* * * In either view, there would be but one single wrongful invasion of a single primary right of the plaintiff, viz., the right of bodily safety, whether the acts constituting such invasion were one or may, simple or complex."

"The cause of action does not consist of facts, but of the unlawful violation or a right which the facts show . . . The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist, and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piece-meal in several actions to recover for the same wrong and injury."

Under the principles announced in **Baltimore Steamship Company v. Phillips**, 274 U. S. 316 (1927), only one cause

of action is alleged in the complaint, but two grounds of relief are alleged. This procedure is the correct manner in which to bring an action in a case of this type.

It is respectfully submitted that the decision of the District Court and the Sixth Circuit is correct and in accord with the rulings of this Court. The doctrine of pendant jurisdiction is a well-settled principle of law, first announced in **Siler v. L. & N. Railroad Company,** 213 U. S. 175, 29 S. Ct. 451, 53 L. Ed. 753 (1909), and later reaffirmed in the leading case of **Hurn et al. v. Oursler et al.,** 289 U. S. 238, 47 S. Ct. 586, 77 L. Ed. 1148 (1933), and in **American Fire and Casualty Co. v. Finn,** 341 U. S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951), wherein it is clearly established that where two distinct grounds in support of a single cause of action are alleged, and the Federal ground is not plainly wanting in substance, the Federal Court, even though the Federal ground be not established, nevertheless, has jurisdiction to dispose of the case on the non-Federal ground. Jurisdiction is not defeated as the petitioners contend by the possibility that the allegations in the complaint might fail to state a cause of action on which the respondent might recover.

It has been pointed out by the Supreme Court on many occasions that the matter of jurisdiction of a lower Court to hear a case and the decision on merits thereof are two entirely different matters. **Bendirup v. Putty Exchange,** 263 U. S. 291, 44 S. Ct. 96. In **Levering and Garrigues Co. v. Morrin,** 289 U. S. 103, 47 S. Ct. 600, 77 L. Ed. 1062 (1933), this Honorable Court very positively stated that the question of jurisdiction of a Court is not based upon the facts developed in the case, but upon the allegations of the complaint.

> "If the bill of complaint sets forth a substantial claim, an action is presented within the Federal jurisdiction, however, the Court upon consideration,

may decide as to the legal sufficiency of the facts alleged to support the same."

and also

"The question of jurisdiction as thus limited is to be determined by the allegations of the bill and not by the facts as they may turn out or by decision of the merit. **Mosher v. Phoenix**, 287 U. S. 29, 53 S. Ct. 67, 77 L. Ed. 148, in cases cited."

In determining whether or not the District Court had jurisdiction to hear and determine this cause, the determination must be decided as of the time that the complaint was filed. **Mullen v. Torrence**, 9 (Wheat.) 537, ... L. Ed. 154 (1924), and **St. Paul Mercury Indemnity Co. v. Red Cab Company**, 303 U. S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938). If jurisdiction exists, it is not contingent or a partial one. Having taken jurisdiction in the case, jurisdiction continues in the Court to dispose of all issues raised by the pleadings. **Bell v. Hood**, 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946); **Ober v. Gallaher**, 93 U. S. 199, 23 L. Ed. 829 (1876); **Armstrong Paint and Varnish Works v. Nu-Enamel Corporation**, 305 U. S. 315, 59 S. Ct. 191 (1938).

The petitioner's contention that the respondent's claim is unsubstantial, was not sustained by the District Court or the Sixth Circuit. The complaint definitely sets forth a substantial claim and does in fact raise serious questions of law and fact which the District Court could decide only after it had assumed jurisdiction of the claim. It is not required for the District Court to retain jurisdiction under the doctrine pendant jurisdiction, that the Federal claim be adjudged valid on the merits. The District Court having acquired jurisdiction under the substantial Federal claim, by use of the doctrine of pendant jurisdiction, should dispose of the entire controversy between the litigants. The doctrine of pendant jurisdiction does not require the complete identity of facts to

prove the Federal and non Federal claim in order that pendant jurisdiction might be retained, but only that the claim not be so unsubstantial as to be frivolous or that the Federal claim cannot be said to be obviously without merit or as pretty clearly unfounded. A Federal Court having asserted its jurisdiction to decide an action under a Federal Statute may, under its pendant jurisdiction, decide the action upon the State claim, even though on the merits of the case, it may ultimately decide that there is no cause of action under the Federal claim against the petitioner.

The petitioner contends that there are great similarities in **Teamsters Local No. 20 v. Morton,** 377 U. S. 252, 84 S. Ct. 1253 (1964), and the instant case as well as the other U. M. W. pendant jurisdiction cases. There is a similarity between the instant case and other cases involving the U. M. W., wherein pendant jurisdiction has been sustained by the Sixth Circuit, but there is little, if any, similarity between the instant case and the Morton case. In the Morton case, the unlawful conduct of the Union was free of any violence or coercion which would remove the unlawful activity of the Teamsters Union from under the protection of the Federal Labor Law Statutes. Accordingly, the recovery for any business losses caused by the Union's peaceful secondary activity proscribed by Section 303 was limited to compensatory damages as provided under the Federal Statute, whereas, in the instant case the pattern of conduct in the use of mass picketing, violence and threats of violence, to intimidate an entire area or section of a State in order that its objectives might be obtained without regard to the legality or illegality of their action sets the instant case apart from the cases of peaceful activities. No matter what the Union's objective might have been, the mass picketing, violence and threats of violence were not protected activities, either as primary picketing or secondary

boycott activities under either Federal or State law. The extension of violence and threats of violence to a front remote from an area or situs of an immediate dispute having as an objective of such violence and threats of violence, the interference with the business intercourse of others, does not escape a secondary boycott ban.

QUESTION NUMBER TWO.

The Judgment for Damages Under State Law Is Based on UMW's Participation in or Ratification of Picket Line Violence and Is Contrary to the "Clear Proof" Requirements of the Norris-LaGuardia Act and the Doctrine of Federal Pre-emption.

The petitioner contends it was error to award damages against it under State law for (1) there was no evidence under the applicable standard of proof of UMW participation in the violence on August 15 and 16; (2) UMW subsequent involvement in the dispute is not clear proof of ratification of prior violence; and (3) the imposition of liability under State law to UMW activities in the dispute conflicts with the doctrine of Federal Pre-emption.

The petitioner puts forth several contentions that the petitioner is not responsible for the unlawful picket line activity and violence absence direct proof of actual participation or actual ratification or actual authorization of the illegal union activities as required by the Norris-LaGuardia Act, 47 Stat. 71, 29 U. S. C. A. 196. The petitioner by stipulation admitted its responsibility for acts of its district representative, George Gilbert, performed in the scope of his employment. (This was an oral stipulation and was not in the written record other than in the opinion of the District Court and found on page 46 of the transcript of the record.)

The petitioners contend that since the case alleges a violation of the Secondary Boycott provision of the Labor

Management Relations Act and also a common law tort as a grounds of recovery. The provisions of Section Six (6) of the Norris-LaGuardia Act, 47 Stat. 71, 29 U. S. C. A. 106, are to be used to determine the question of agency and liability of the petitioner. Although a judgment be entered in a case under the common law of Tennessee and the federal ground not be sustained, it does not change the standard of proof required to prove agency either under the provisions of the Taft-Hartley Act or under the common law tort to the standard of proof required by Section Six (6) of the Norris-LaGuardia Act. Had the respondent sought an injunction against the alleged unlawful nonviolent activity of the petitioner the anti-injunction provisions of the Norris-LaGuardia Act might be applicable.

This action was based on two grounds of recovery, the ground based on a Federal Statute was brought under the provisions of the Taft-Hartley Act, as amended, specifically 29 U. S. C. 187 (b), 61 Stat. 158, which states as follows:

> "(b) Whoever shall be injured in his business or property by reason or any violation of sub-section (2) of this section may sue therefore in any District Court in the United States subject to the limitation and provision of Section 185 of this title without respect to the amount in controversy, or in any other Court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

And the second ground as previously stated was brought under the provision of the common law of Tennessee for the unlawful interference with employment and business relations of the respondent. The respondent did not request in the pleading any injunctive relief enjoining and/or prohibiting the petitioner from its alleged unlawful conduct. The test of agency to be applied under the

Labor Relations Act is contained in 29 U. S. C. 185 (e) and provides:

> "(e) For the purposes of this Section, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

29 U. S. C. 187 (b) provides that the limitation and provisions of Section 301, 29 U. S. C. 185 shall be applicable to actions brought under that section, and 29 U. S. C. 185 (e) provides the test to be used to determine the question of agency. The history of the Act shows the intent of Congress was to apply to suits of this character the common law rules with respect to liability for acts of agent. **U. M. W. v. Patten,** 211 F. 2d 742, C. A. 4, 1954; **International Ladies Garment Workers Union v. N. L. R. B.,** C. A., 237 F. 2d 545, 99 U. S. App. D. C. 64 (1956).

In the case of the **United Mine Workers of America v. Patten,** 211 Fed. 2d 742, 4 C. A. (1954), the same contention of petitioner were made and the Fourth Circuit ruled that a Union is answerable for the unlawful acts of its agent within the scope of his employment, even though the specific unlawful acts are neither authorized or ratified by the Union. The Court in discussing and quoting the legislative history of the provisions of 29 U. S. C. A. 185, quoted from 93 Congressional Record, page 7001, on Legislative History of Labor Management Relations Act, Vol. 2, page 1622, the following:

> "Section 2 (2), 2 (13), and 301 (e): The conference agreement in defining the term employer struck out the vague phrase in the Wagner Act 'anyone acting in the interest of an employer' and inserted in lieu thereof the word 'agent.' The term agent is defined in section 2 (13) and section 301 (e), since it is used

throughout the unfair labor practice sections of title I and in sections 301 and 303 of title III. In defining the term the conference amendment reads 'the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.' This restores the law of agency as it has been developed in common law."

* * * * * * * *

"It is true that this definition was written to avoid the construction which the Supreme Court in the recent case of **United States against United Brotherhood of Carpenters** (12 Labor cases 51,241) placed upon section 6 of the Norris-LaGuardia Act which exempts organizations from liability for illegal acts committed in labor disputes unless proof of actual instigation, participation, or ratification can be shown. The construction the Supreme Court placed on this special exemption was so broad that Mr. Justice Frankfurter, speaking for the dissenting minority, pointed out that all unions need do in the future to escape liability for the illegal actions of their officers is simply to pass a standing resolution disclaiming such responsibility. The conferees agreed that the ordinary law of agency should apply to employer and union representatives. Consequently, when a supervisor acting in his capacity as such engages in intimidating conduct or illegal action with redating conduct or illegal action with respect to employees or labor organizers his conduct can be imputed to his employer regardless whether or not the company officials approved or were even aware of his actions. Similarly union business agents or stewards, acting in their capacity of union officers, may make their union guilty of an unfair-labor practice when they engage in conduct made an unfair labor practice in the bill, even though no formal action has been taken by the union to authorize or approve such conduct."

In the instant case, George Gilbert was identified by Mr. Albert Pass, Secretary-Treasurer of District Nineteen, as a District Nineteen Representative or what is commonly referred to as a field representative (R. 296a). When Mr. Pass received a telephone call from a Mr. Henry Turner advising the District of the situation (R. 298a), he and Mr. Riddings, District President, called Mr. Gilbert into his office and instructed Mr. Gilbert to go to the Gray's Creek area, make an investigation and see what the situation was and report back. Further, that if there was any picketing, he was to limit the picketing and see that none of the other mines were closed (R. 299, 300a). George Gilbert defined his duties as a field representative to be "well, the duties of a field representative is to organize the unorganized, settle grievances where the mine is under contract, keep the mine working according to the contract" (R. 326a).

Mr. Gilbert admitted that he laid the plans for the pickets to be cut down to three men per shift and where they would be located throughout the 24 hours of each day (R. 334a). Walden Schrum, President of Local 5881, United Mine Workers of America, received information that these mines were to be opened on the Saturday preceding Monday, August 15. He called a meeting of the Local Union for Sunday afternoon at 2:00 o'clock, and he also tried to get in touch with Mr. Gilbert to advise him of the circumstances (R. 455, 57). Mr. Schrum was present on the morning of August 15 and 16 in the Gray's Creek area and also in the Coal Valley area when the greatest part of the violence took place (R. 466-468).

On August 22, Sam Swope was in the area of the Gray's Creek Mine, and when he approached the area where the pickets were located, he did observe one rifle (R. 160). Mr. Swope observed Mr. Gilbert's car parked near the picket line and for that reason he asked to talk with Mr.

Gilbert. Mr. Gilbert then came out of the wooded area located on the left side of the road. Mr. Gilbert gave Mr. Swope directions to a road he could take to get into another coal mine and said there would be "some of his men there", and for Mr. Swope to tell the men that he said it was alright to go through (R. 161 and 162). John Higgins testified that on one occasion he saw Mr. Gilbert stop, open the trunk of his car and drop off food to the pickets on the picket line (R. 220, 222), and that shortly after the occurrence on August 15 and 16, George Gilbert stated that Paul Gibbs was trying to bring in another Union and that he wasn't going to get by with it (R. 219). Mr. Gilbert also made similar statements to Jim Campbell and that he had ways of preventing Gibbs from bringing in this other union (R. 256 and 257).

The Taft-Hartley Act expressly makes the International Union liable for the acts of its agents, employees and representatives for all business of the master. It is true no written document of any resolution of either the International Union United Mine Workers or District Nineteen authorizing or ratifying the unlawful Union activities was proven nor was evidence of a written resolution disaffirming said acts introduced by the petitioner. Seldom in a case involving Secondary Boycott or a common law conspiracy will written or direct evidence of the conspiracy be found. Acts done to give effect to a conspiracy may be in themselves lawful and wholly innocent acts, yet if they are part of the sum of the acts which the statute forbids, they come within the prohibition. **American Tobacco Co. v. United States**, 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946). Further the question of whether there was an unlawful conspiracy or a Secondary Boycott is not to be determined by the process of segregation and isolated treatment of various activities engaged in by the petitioner. A conspiracy is to be viewed by the Court as a whole; the integral parts thereof are not to be weeded

out and inquired into separately. **United States v. Patten,** 226 U. S. 525 (1913).

Under the facts of the case, it was a case for the jury under Section 303, 29 U. S. C 187 of the Labor Management Relations Act, 61 Stat. 158, and the evidence was sufficient to establish that immediately upon the return to the area to settle the local dispute as directed by officers of District Nineteen, Mr. Gilbert took over control of the picketing and was acting within the scope of his employment when he made the declaration of intention of the petitioner to the various witnesses in regards the Gibbs problem.

The petitioner contends that under the Doctrine of Federal Pre-emption, the District Court would not have jurisdiction and was without power to award damages caused by the unlawful activities against the respondent. Reliance is made upon the case of **Local 20, Teamsters v. Morton,** 377 U. S. 615, 84 S. Ct. 1253 (1964). The petitioner says that the conduct of the Union here before the Court was traditional union activity and is protected by the Labor Management Relations Act. It is most strongly insisted by the respondent that the activities complained of by the respondent are not traditional union activities within any reasonable view of the Federal Statutes. As this Court stated in **International Union, United Automobile Workers v. Russell,** 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 1030 (1958), that mass picketing, violence and threats of violence were not union activity protected by Federal law. Also in **United Construction Workers v. Laburnum Corporation,** 347 U. S. 656 (1954), 74 S. Ct. 833, 98 L. Ed. 1025. This Court drew the distinction between the provision of unfair labor practices and the compensation for tortious conduct of the union. The Court said that Congress has not prescribed procedure for dealing with consequences of tortious conduct already committed

and that the Act authorizes suits for unlawful strikes or boycotts in both Federal and State Courts. In **San Diego Building Trades Council, etc. v. Garmon**, 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 755 (1959), a State Court's jurisdiction to award compensatory and punitive damages for violent union activity was reaffirmed although it was not applicable to the decision of the case.

> "It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. **International Union, United Automoble, Aircraft and Agricultural Implement Workers, etc. v. Russell**, 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030; **United Construction Workers, etc. v. Laburnum Const. Corp.**, 347 U. S. 656, 74 S. Ct. 833, 98 L. Ed. 1025. We have also allowed the States to enjoin such conduct. **Youngdahl v. Rainfair, Inc.**, 355 U. S. 131, 78 S. Ct. 206, 2 L. Ed. 2d 151; **United Automobile, Aircraft and Agricultural Implement Workers, etc. v. Wisconsin Employment Relations Board**, 351 U. S. 266, 76 S. Ct. 794, 100 L. Ed. 1162. State jurisdiction has prevailed in these situations because the compelling state interest in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction. We recognize that the opinion in **United Construction Workers, etc. v. Laburnum Const. Corp.**, 347 U. S. 656, 74 S. Ct. 833, 835, 98 L. Ed. 1025, found support in the fact that the state remedy had no federal counterpart. But that decision was determined, as is demonstrated by the question to which review was restricted, by the 'type of conduct' involved, i. e., 'intimidation and threats of violence'."

In **Teamsters Local 20 v. Morton**, supra, a case involving peaceful secondary activities which were proscribed

by the Federal Statute, compensation for damages for business losses caused by the union's peaceful secondary activities would be governed by the Federal Statute and be limited to compensatory damages. In a case involving extreme violence, threats of violence and intimidation, State law has been permitted to prevail and allowed to grant compensation for the consequences of such violent conduct as defined by the traditional law of torts. Under the laws of the State of Tennessee compensatory and punitive damages are permissible for the unlawful interference with the business or employment of another.

It is respectfully submitted that **Teamsters Local 20 v. Morton** did not reverse any of the principles of law set out in the cases of Laburnum and Russell. There is a very clear distinction between the instant case and the Morton case. In the Morton case there was evidence of lawful and unlawful secondary activities on the part of the union. Although unlawful activity, it was free of any violence on the part of the union. Therefore, the state law, if in conflict must yield to the Federal Statute and the state is without authority to award punitive damages. This is not the situation in the instant case. There was mass picketing, violence, threats of violence and death, intimidation and imminent threats of public disorder throughout the area. This type of conduct on the part of the union brings the case within the principle of Laburnum and Russell and a court, either state or Federal, may award both compensatory and punitive damages under the traditional law of torts.

There is also a distinction between the case at bar and the Morton case as relates to what may be subject to compensation either under Federal Statute or local law. The Morton case involved two types of secondary activities, one being unlawful and compensable under the statute, the second being lawful under the Federal Statute and non-compensable. The loss of a contract as in the Morton

case, without being a result of unlawful activities, is one of the methods of labor to bring pressure upon an employer and is protected. In the instant case, the loss of respondent's contract was due to the acts of violence and threats of violence, mass picketing and intimidation on the part of the union. The unlawful interference occurred at the threshhold of the campaign—the loss to the respondent occurred immediately after the violent show of force. The threats of violence and imminent threats of public disorder remained even though it may have appeared peaceful on the surface, and the loss to respondent was immediate and not as a result of the continued "peaceful picketing" for a long period of time. A close parallel to the present case is found in **Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies, Inc.**, 312 U. S. 552, 61 S. Ct. 287 (1941), where peaceful picketing was accompanied by violence, this Court, in describing the effect of the activities upon the minds of men, said:

> "Back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution."
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> * * * * * * *
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> "And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though further picketing might be wholly peaceful."

QUESTION NUMBER THREE.

Is the Petitioner Entitled to a New Trial Because of a Closing Argument of Respondent's Counsel?

The petitioner contends that the argument by respondent's counsel was made with an intent to incite prejudice and passion in the minds of the jurors against the petitioner, thereby depriving them of a fair trial. This contention is based primarily on the fact that a sizeable verdict was returned by the jury and that a remittitur was suggested by the District Court ruling on the petitioner's motion for a new trial and the District Court's opinion that the remarks of counsel were improper but not prejudicial. The mere fact that a substantial verdict was rendered by the jury and that a remittitur was suggested should not be made the basis of any presumption that the trial court believed the jury was governed by prejudice or bias or engaged in a wilfull disregard of the evidence in determining the verdict. **Fairmount Glass Co. v. Cub Fork Coal Co.**, 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439 (1940). The District Court was of the opinion that counsel's argument was improper, but when viewed on the record as a whole, was not prejudicial to the rights of the petitioner and did not deny the petitioner a fair trial on the merits of the cause. Although remarks of counsel may be improper, of questionable propriety or reprehensible, such remarks under all the circumstances must be prejudicial to the rights of the other party to require reversal or granting a new trial. Examples of argument of counsel which have been reviewed and found not to be prejudicial are:

> "Argument that $25,000.00 meant nothing to defendant. **Sheffield Steel Corp. v. Vance**, 236 F. 2d 938 C. A. 8, 1956. If jury found for plaintiff, they would in effect accuse master and mate of being criminally negligent. **Morron v. Atlantic Refining Co.**, 176 F. 2d

313 (C. A. 3), 1949. Plaintiff's counsel's reference to a truck as 'Monster' or 'Battle Ship'. **Associated Petroleum Carriers v. Beall**, 217 F. 2d 607 (C. A. 5), 1955. 'The casualties in war are provided for by a grateful Government. I leave it to you to say as an illustration of industry and its gratitude for one whose duty * * *' **Fleming v. Husted**, 164 F. 2d 65 (C. A. 8), 1947, cert. denied 333 U. S. 843, 68 S. Ct. 661, 92 L. ed. 1127. Argument picturing defendant as friend of poor against defendant who was pictured as exploiter of the defenseless. **Show Warehouse Co. v. Southern Railway Co.**, 294 F. 2d 850 (C. A. 5th), 1961, cert. denied 369 U. S. 850, 82 S. Ct. 933, 8 L. Ed. 2d 9. Characterization of defendant as a monster. **Smith v. McNulty**, 293 F. 2d 924 (C. C. A. 5th), 1961."

Ordinarily an Appellate Court will not upset a verdict for inadvertent or provoked, or other improper arguments which does not impress as having been made in bad faith unless the record as a whole and result at least indures conviction that the jury must, as a matter of sympathy, bias or prejudice, have been materially affected by it. **Sheffield Steel Corp. v. Vance**, 236 F. 2d 938 (C. A. 8th), 1956. The District Court in ruling on the motion for a new trial was of the opinion that the jury in reaching its verdict heeded the instructions given by the Court, that the jury reached its verdict in light of the facts presented by the evidence introduced in the trial and based its findings on the evidence. The District Court found the respondent was not entitled to recover the loss of prospective profits from the trucking contract as there was an absence of evidence which was of probative value because the exhibits prepared by the respondent to prove loss of prospective profits were based on the violation of the Tennessee Truck Weight Statute, and that there was evidence to sustain the verdict awarding damages for the loss of the employment contract (R. 56).

In argument, counsel may discuss the facts as proved or as admitted in the pleading, the conduct of parties, attack the credibility of witnesses, rebut the argument of opposing counsel, may legitimately appeal to the jury to perform their duty and to use caution in formulating their verdict so that there will not be inconsistency between the various parts. In view of the cautionary instructions given by the District Court at the time objection was made to respondent's counsel argument (R. 487, R. 490) and counsel's prompt abandonment of the argument which was objected to and the further cautionary instruction given the jury to eliminate from the deliberations of the jury any feelings of prejudice, sympathy or bias that the jury might have, for or against either party, and specifically cautioning that in the field of labor-management relations many people have personal feelings and strong opinions and urging them not to allow any personal feelings, sympathy or prejudices to divert the jury from deciding the case strictly on the basis of the evidence and on the law removed any effect that any improper remarks may have had on the jury.

The District Court reviewed respondent's counsel argument in a different perspective than petitioner and was of the opinion that the jury's verdict was excessive in view of the evidence relating to damages and not as a result of mistake, sympathy, prejudice or other improper motive on the part of the jury in determining liability. The question of excessiveness of verdict is primarily for the trial court and will not be disturbed unless the verdict is so grossly excessive that the denial by the trial court of a motion for new trial constitutes an abuse of discretion. **Trowbridge v. Abrasive Co. of Philadelphia**, 190 F. 2d 82 (C. A. 3), 1951. The District Court applied the well settled general rule where a jury's verdict appears to be excessive, a trial court may make an order denying a motion for a new trial upon the condition that the successful party remit a certain sum

from the verdict, as in the court's judgment would constitute just damages. **Dimick v. Schiedt,** 293 U. S. 474, 55 S. Ct. 296, 79 L. Ed. 630 (....); **Northern Pacific Railway Co. v. Herbert,** 116 U. S. 642, 6 S. Ct. 590, 29 L. Ed. 755 (....); **Koeningsburger v. Richmond Silver Mining Co.,** 158 U. S. 41, 15 S. Ct. 751, 39 L. Ed. 889; **Mills v. Scott,** 99 U. S. 25, 25 L. Ed. 294; **Arkansas Valley Land and Cattle Co. v. Mann,** 130 U. S. 69, 9 S. Ct. 458, 32 L. Ed 854; International Paper Co. v. Busby, 182 F. 2d 790 (C. A. 5), 1959; White Oak Coal Company v. UMW, 319 F. 2d 591 (6 C. A.), 1963.

The Sixth Circuit was of the opinion that the remarks of counsel fell within this area and agreed with the District Court (R. 536). It is respectfully submitted that the amounts of the verdict, for both compensatory and punitive damages, are not to be used as a indicator of bias, prejudice, passion or other misconduct on the part of a jury in its determination of the issues in a controversy. The argument and remarks of counsel were not designed to incite prejudice or passion on the part of the jury. The District Court properly exercised its authority and applied well established principles of law to cure what in its opinion was an excessive verdict by conditioning a denial of a new trial with the suggestion of a remittitur of that portion of the jury verdict which in its opinion was excessive and thereby eliminated by the exercise of this judicial discretion any excessiveness of the verdict.

QUESTION NUMBER FOUR.

Having Submitted an Erroneous Theory to the Jury, the Verdict May Not Be Sustained on Another Theory Which Was Proper to Submit to It.

The District Court, the petitioner and the respondent were fully aware of the many difficulties of trying a case

as the instant case and the danger of possible error which would result in having the case reversed by an appellate Court for such error. In an effort to prevent error, the District Court exercised its sound judicial discretion and decided to submit the case to the jury for a general verdict accompanied by special interrogatories, as is provided in 49 (b), Federal Rules of Civil Procedure, 29 U. S. C. Rule 49 (b). On November 13, 1962, a conference of the District Court, counsel for the petitioner and counsel for the respondent the questions to be submitted to the jury as special interrogatories and the verdict form to be used were fully discussed. The petitioner did not object to the questions to be submitted to the jury nor the form prepared by the District Court. The petitioner did not request any change in the questions to be submitted or any change in the verdict form. The petitioner did not submit or request to submit any additional questions or a different verdict form to the jury (R. 67a). After the case was submitted to the jury and a verdict was returned, the petitioner did not move at that time or before the jury was dismissed that the case be resubmitted to the jury for further deliberation in order to correct the alleged inconsistency in the answers to special interrogatories and general verdict. The respondent believes that the petitioner by its failure to act at the appropriate time waived any alleged error and definitely did not preserve its right to allege this as error at this time. By its failure to act, the petitioner waived its right to require presentation to the jury of any other issue which it now deems necessary for a proper decision of the case, and waiving its right to trial by jury upon any such questions it failed to submit, and the District Court would be authorized to make findings upon that point. **Safeway Stores v. Dial**, 311 F. 2d 595 (C. A. 5) (1963). **Penn v. Glenn**, 265 F. 2d 911, C. A. 6 (1959). **Merrill v. Beaute Vues Corp.**, 235 F. 2d 983, C. A. (1956); **A. M. Webb & Company v. Robert P. Miller Company**, 78 F. Supp. 24

(1948) (reversed on other grounds, 176 F. 2d 678); **Ribeiro v. United Fruit Company**, 284 F. 2d 372, C. A. (1960), Cert. denied 81 S. Ct. 905, 365 U. S. 872, 5 L. Ed. 2d 861 (1961). Upon examination of the verdict form (R. 31-34) the jury in answer to the special interrogatories found UMW guilty of violating the Federal Statute and also guilty of the Common Law tort of interference with business or contractual relations, and awarded both compensatory and punitive damages. The answers of the jury on the special interrogatories and the award of damages are not inconsistent. The jury awarded damages for the violation of one right and by its award of punitive damages it is apparent that the award of the jury was made for the Common Law tort. A close scrutiny of the instructions of the Court in its charge to the jury specified what damages could be awarded under the two grounds of recovery. The Court charged punitive damages could not be awarded by reason of a violation of the Labor Management Relations Act and that only actual damages could be awarded under the act. The Court further charged that punitive damages might be awarded under the Common Law if the necessary basis for punitive damages was found (R. 509-513). Under Rule 49 (b), Federal Rules of Civil Procedure, specific provisions are made for the course to be followed where there is an inconsistency between the general verdict and the answer to interrogatories. This particular point was before the Honorable Court in **Gallick v. B. & O. Railroad Company**, 372 U. S. 108, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963), and it was determined that if there be any inconsistency between the verdict and the jury's answer to interrogatories it is the duty of the Court to harmonize the answer, if possible, under a fair reading of the Court's instructions and the special verdict. The District Court did not find the answers to the interrogatories and the general verdict to be so contradictory or inconsistent that under a fair reading of the Court's instructions they could not be reconciled with the general

verdict. The principles to be followed by the District Court in reconciling any inconsistency between the answers to special interrogatories and the general verdict as established by this Court in **Gallick v. B & O Railroad Company**, supra, **Atlantic and Gulf Stevedores, Inc., v. Ellerman Line Limited**, 369 U. S. 355, 82 S. Ct. 780, 7 L. Ed. 798 (1962), **Arnold v. Panhandle S. F. R. Co.**, 353 U. S. 360, 77 S. Ct. 840, 1 L. Ed. 899 (...); and in **McVey v. Phillips Petroleum Company**, 288 F. 2d 53 (C. A. 5) (...); **Morris v. Penn. Railroad Co.**, 187 F. 2d 837 (C. A. 2) (...), were applied by the Court and any inconsistency, if any, was reconciled and the proper judgment entered.

The instant case is clearly distinguishable from **Sunkist Growers, Inc. v. Winckler and Smith Citrus Products Co.**, 370 U. S. 19 (1962). In the Sunkist case, the petitioner was charged with a violation of the Federal Antitrust Statutes and claimed an exemption from the application of the Antitrust Statutes by virtue of the Capper-Volstead Act. The instructions of the Trial Court to the jury were ambiguous in that it did leave open for the jury to base their verdict upon a finding of conspiracy between the Sunkist and Exchange Orange and Exchange Lemon, wholly owned subsidiary cooperatives within the provisions of the Capper-Volstead Act, and exempt from anti-trust regulations of the Sherman and Clayton Anti-Trust Acts, and therefore could not be conspirators with Sunkist. In the present case it is respectfully submitted that no error was made in the submission of the issues to the jury, or in the instructions of the Court or in the answers to interrogatories and general verdict which create any inconsistency or conflict to support the contention that the general verdict may have rested on an erroneous theory of liability. The petitioner contends that the jury may be considered or based its verdict on the premise that peaceful picketing cost Gibbs to lose "eight years of salary" it awarded him. This is specula-

tion on the part of the petitioner. The measure of damages for the violation of the common law tort as contended by the petitioner, although not specifically made a point or error, is not as the petitioner has reasoned in its argument and should not be used to infer the jury was guilty of misconduct in determining the merits of the case. The activities of August 15 and 16 were an aggravated and unjustified interference with the respondent's right, and shows a reckless disregard of respondent's rights and were in actuality malicious acts. The measure of damages under the situation presented in this case, is based on a Common Law tort and would be the direct and proximate result of the wrongful acts of the petitioner and not the measure of damages as would be awarded in an action for breach of contract. **Duke v. Brotherhood of Painters, Decorators, and Paper Hangers of America**, 191 Tenn. 495, 235 S. W. 2d 7 (1950); **United Auto Workers v. Russell**, supra, **United Construction Workers v. Laburnum**, supra; **Bryson v. Bramlett**, 204 Tenn. 347, 321 S. W. 2d 555 (1959). In an action brought for the redress of a wrong, intentionally, wilfully or maliciously committed, the wrong-doer will be held responsible for the injuries which he has directly caused even though they lie beyond the limits of natural apprehended results as might be the case where an injury was unintentionally, but negligently inflicted. **Milwaukee & St. P. R. Co. v. Kelloggs**, 94 U. S. 469, 475, 24 L. Ed. 256 (...); **Pratt v. Duck**, 28 Tenn. App. 502, 191 S. W. 2d 562 (1945); **Dukes v. Local Union 437**, supra. In cases where the wrong-doer has intentionally invaded the rights of another, damages for such acts will not be limited to damages as established for a breach of contract or tort arising out of a negligent act, but will cover all the consequences resulting from intentional acts. The effect of the acts of August 15 and 16 were the controlling facts of the interference with respondent's rights and the later peaceful picketing did not contribute to the success or failure of the intended

results. The invasion of respondent's rights, although continuing in its effect, was accomplished in the first few days of the petitioner's campaign and the subsequent events, peaceful picketing, did not add or detract from the effect of the threshold success already acquired by the petitioner.

CONCLUSION.

Respondent submits that this Court should affirm the judgment of the Sixth Circuit as well as the District Court's judgment of August 28, 1963.

Respectfully submitted,

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